No. 12,594

IN THE

United States Court of Appeals

For the Ninth Circuit

TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, a Corporation,

and

THE INDUSTRIAL COMMISSION OF ARIZONA, a Public Agency,

Intervenors-Appellants,

vs.

JOHN E. HUBBELL and WILMA HUBBELL,

Appellees.

Appeal from the United States District Court, District of Arizona.

INTERVENORS-APPELLANTS' REPLY BRIEF.

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INTERVENORS-APPELLANTS' REPLY BRIEF.

INTRODUCTION.

We have examined appellee's brief and find that it departs from the rule in failing to apply the argument to the several propositions of law tendered in the opening brief.

And, in his brief, appellee fails to discuss several of appellants' propositions, among which are the contention that the Commission had made an award;

and, that the only way the award could be set aside was by a timely action in certiorari to the Supreme Court of Arizona, of which appellee failed to avail himself. The award became *res judicata*. (See Opening Brief of Intervenors-Appellants, page 31).

We shall, therefore, respond to appellee's brief in the manner in which he presented the argument of his case.

Under the heading:

GENERAL SUMMARY

we note that he affirms the statement we made on page 24 of our opening brief, that it is impossible to determine from the record upon what grounds the court predicated its conclusions of law. All we do know is that the only issues the Court submitted to the jury were the questions of negligence, contributory negligence, and the amount of damages.

FELLOW SERVANT ISSUE AND CONSTITUTIONAL QUESTION.

On page 7 of his brief appellee tenders the issue:

> "Under the Arizona Constitution and workmen's compensation statutes, an injured employee may sue a fellow servant for negligence even though their common employer is covered by workmen's compensation insurance."

And he raises a Constitutional Issue. This contention was presented for the first time—so far as our recollection, and a search of the record discloses —at pages 2 and 3 of his brief, entitled:

"Plaintiff's Memorandum of Authorities in Reply to Defendants' and Intervenors' Motion for Judgment *Non Obstante Veredicto,* and Defendants' Motion for New Trial",

filed on April 26, 1950.

In his pleadings appellee proceeded on the theory that Sanderson & Porter were *"independent contractors";* and it was upon that basis that he claimed a cause of action. Our recollection is that at no time during the course of the trial was it suggested that it was immaterial whether Sanderson & Porter were independent contractors, and that a cause of action would lie against them even if they were not independent contractors but fellow employees engaged in furthering a common enterprise.

It was not until after the verdict that appellee advanced the theory that he had a right to sue a *"co-employee";* and that if the statute prohibited suit against a fellow employee the statute was unconstitutional.

Appellee may not have his cake and eat it, also. He may not plead, and claim, rights granted under the workmen's compensation law in one breath; and, in the next, claim (as he argues on page 8) that the statute, under which he is attempting to claim benefits, is unconstitutional as a denial of "due process", or in violation of the *Constitution of the United States;* Amendment No. XIV.

Ison v. Western Vegetable Distributors, 48 Ariz. 104, 59 P. (2d) 649, citing in support thereof *Tovrea*

Packing Co. v. Live Stock Sanitary Board, 44 Ariz. 151, 34 P. (2d) 420; *Booth Fisheries Co. v. Industrial Commission,* 271 U.S. 208, 46 Sup. Ct. 491, 70 L. Ed. 908; *Daniels v. Tearney,* 102 U.S. 415, 26 L. Ed. 187; *Grand Rapids & I. R. Co. v. Osborn,* 193 U.S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598; and recently reaffirmed in *Shaw v. Salt River Valley Water Users,* 69 Ariz. 309, 213 P. (2d) 378; *Leva v. Utah Fuel Co.,* 58 Utah 388, 199 Pac. 659; *Orloff v. Los Angeles Turf Club,* 208 Pac. 987.

THEORIES OF LAW.

Aside from the asserted question of unconstitutionality which, as we have urged, cannot be raised, appellee's argument is a clear illustration of what the Supreme Court of Arizona has referred to as an example that "old ideas die hard".

In order to appraise the issue tendered we first look to the intent of the people of Arizona in amending the *Constitution* (Art. XVIII, Art. 9; Chap. 56, *Arizona Code Annotated,* 1939, Amended, Sec. 8) and of the legislature in adopting the statute. (See Appendix I for provisions of the Constitution, in part).

Section 99, Chapter 83, *Session Laws of Arizona* (1925) which exempted the statute from the referendum provisions of the *Constitution of Arizona,* expressed the intent (as shown in Appendix II hereof).

Sections 56-928 and 56-929, *A.C.A.* 1939, (quoted in our opening brief), define who is, and who is not,

an employer and employee under the statute. In construing the words in the compensation law the definition of the word "person" in Section 1-103 of the general construction law obtains, unless the context of the statute indicates contrary. Sec. 56-929 (a) includes:

> "* * * 2. *every person* in the service of any employer * * *." (Immaterial parts omitted).

Section 1-103, 3, *A.C.A.* 1939, defines the word "person" as including: "a corporation, company, partnership or association or society, as well as a natural person."

That the workmen's compensation law is intended to include all such "persons" is clearly established by *Grabe v. Industrial Commission,* 38 Ariz. 322, 299 Pac. 1031; *Industrial Commission v. Navajo County,* 167 P. (2d) 113, 64 Ariz. 172; *S. H. Kress & Co. and Clarence L. Wise v. Superior Court, Maricopa County,* 66 Ariz. 67, 182 P. (2d) 931.

Under the Arizona workmen's compensation law, according to the provisions of Art. XVIII, Sec. 8, *Constitution of Arizona,* as amended; and Sec. 56-944 and 56-945, *A.C.A.,* 1939, every employee is afforded a right of election prior to injury, whether to be bound by the compensation law or to preserve any other remedy which might be available to him. If the employee fails to elect to reject the compensation law before injury, under Sec. 56-944 and 56-945, *supra,* the workmen's compensation law becomes his exclusive remedy against the employer (and, in ef-

fect, against co-employees) except as provided by Sec. 56-944 and Sec. 56-945, supra (where the injury is wilfully inflicted by the employer). *Alabam Freight Co. v. Hunt,* 29 Ariz. 419, 242 Pac. 658. And this applies even in the case of a minor unlawfully permitted to work and who might otherwise disaffirm his contract. *S. H. Kress & Co. v. Superior Court, Maricopa County,* supra. There is only one other qualification, that is under Sec. 56-949. This Section confers no affirmative right of election on an employee who has elected not to reject the provisions of the workmen's compensation law in the manner provided by Secs. 56-944, 56-945 and 56-946 against a co-employee. The right of election, under Sec. 56-949, is limited to the right to prosecute an action against a third party NOT in the same employ. We think the clear implication always given the statute is that it withdraws entirely the subject of fellow servant liability for all purposes *to avoid litigation, friction and hatred in industry.*

The maxim: *"Expressio unius est exclusio alterius"* is applicable.

Further, Sec. 56-949, supra, does not purport to confer upon an employee the right to collect from the employer, or his insurance carrier, "the deficiency between the amount actually collected and the compensation provided, or estimated therein for such case" when a co-employee is involved.

If the Section be construed, as contended for by the appellee, and an employee has a right to sue a

co-employee, then (under that interpretation) he would have no right to any claim against the employer, or his insurance carrier, for any compensation benefits for the reason that the election is limited to "a person NOT in the same employ."

If appellee's argument be valid that he had an unquestioned right of election after injury against the co-employee, and he elected to take compensation, it would follow that his cause of action against the co-employee would be assigned to the employer, or his insurance carrier, as a matter of law. We would then have the spectacle of the employer, or his insurance carrier, having the right to sue the co-employee to recover the losses the employer, and the insurance carrier, would be bound to pay under the compensation law.

We can conceive of no result that would do more to *promote and engender hatred and distrust between employee and employer.*

Under the Constitution the fellow-servant rule as a defense, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of a fellow servant, or common master, is forever abrogated; and the defense of contributory negligence, or assumption of risk, shall in all cases whatsoever, be a question of fact, and shall at all times be left to the jury. *Constitution of Arizona,* Art. XVIII, Sec. 4 (Fellow Servant) and Sec. 5 (Contributory Negligence). Appellee's thesis would, in effect, reinstate the fellow servant rule in part.

We refer the Court to the Arizona employers' liability cases: *Ariz. Copper Co. v. Hammer,* 250 U.S. 400, 63 L. Ed. 1058, 30 S.C. 558; *Robles v. Preciado,* 52 Ariz. 113, 79 P. (2d) 504, for the legislative history prior to adoption of the Arizona workmen's compensation law. For construction of legislative intent after amendment of the Constitution see *Ocean Acc. & Guar. Corp. v. Industrial Commission,* 32 Ariz. 275, 257 Pac. 644; *Robles v. Preciado,* supra.

In *Ariz.-Hercules Copper Co. v. Crenshaw,* 21 Ariz. 15, 184 Pac. 996, as early as the year 1919, the Court, in a unanimous opinion, per Baker, expressed the thinking of the Court and of the people of this state. The case involved the matter of construction of the phrase "independent contractor", and is cited as one of the cases under *Definition 220, Agency, Re-Statement of the Law, Arizona Supplement.* The defense of the company was that Manuel Segura, employed by Henry Nolte, an alleged independent contractor, was hired to sink a mining shaft at the rate of $35 per foot. The reasoning in the case is particularly apt.

In *Corral v. Ocean Acc. & Guar. Corp.,* 42 Ariz. 213, 23 P. (2d) 934, the late Justice Ross, probably one of our most cogent writers, said (at page 217):

> "The purpose of the compensation act, as has been repeatedly stated, is, as much as possible, *to dispense with turmoil, contention, and litigation between employer and employee,* and to place upon business the burden of caring for employees injured, or, when killed, their dependents. *Our compensation law is replete with this thought.*" (Emphasis supplied.)

The contention made by appellee in re the case of *Judson v. Fielding* that the compensation law did not amend the common law rights, does not hold good here. The workmen's compensation law regulates the status of employer and employee in Arizona. *Ocean Acc. & Guar. Corp. v. Industrial Commission,* supra, *Robles v. Preciado,* supra.

Appellee's contention that the provisions of the statute doing away with a cause of action against a co-employee are unconstitutional has been answered to the contrary. *Northern Pac. Ry. Co. v. Meece* (1916), 239 U.S. 614, 60 L. Ed. 467; *Mathison v. Minn. St. Ry. Co.* (1914), 126 Minn. 286; *S. H. Kress & Co. v. Superior Court, Maricopa Co.,* supra.

In any event, any contention appellee might have to assert such a remedy is foreclosed by the authorities aforementioned.

FELLOW EMPLOYEE.

At page 28 of our opening brief we cited *S. H. Kress & Co.* and *C. L. Wise v. Superior Court,* supra, as the "case most nearly in point" on this issue. The case was defended by the Industrial Commission on the same premises as we appear as a party in this case. Under the terms of our policy of insurance, issued pursuant to Sec. 56-921, *A.C.A.* 1939, the Commission insures the entire underlying liability of the employer to his employees, including the cost of an action. The Gas Company in this case asserts that defendants and appellee are its employees. We include

in the Appendix a quotation from our brief in the *Kress* case—our argument as it related to defendant Wise. (Appendix III.)

In our opening brief we limited our language to the "case most nearly in point" for the reason that in the decision granting the writ of prohibition in that case—which, of course, applied to both defendants—the Court did not discuss the application of the law as it related to Wise. However, it did order the dismissal of the complaint as to Wise as well as to Kress Company.

The facts here are similar to those in *Gray v. Hammond Lumber Co.,* 113 Ore. 570, 232 Pac. 637, 233 Pac. 561, 234 Pac. 261, which we shall discuss hereafter.

On pages 72 and 73 of the appellee's brief he makes further reference to this matter and intimates that the intervenors-appellants have changed their theory of the case. The contrary is true. The matter quoted from the Abstract (page 72), on its face, shows that what intervenors-appellants were then referring to was "rescission after election", and that we were not then discussing the "right of the appellee to sue a co-employee."

The question of the application of the *Kress* case to the matter of the liability of a co-employee was not in the mind of the writer in connection with the subject then under consideration. Therefore, the argument and authorities cited on inviting error are not apposite.

On page 73 of appellee's brief he states:

> "* * * counsel have been nonplussed to understand why the Commission has fought so tenaciously to prevent the Plaintiff from relieving it of a $50,000.00 compensation load * * *."

The explanation is clearly indicated by the fact that we merely followed identical principles and policies as were presented in the *Kress,* and many other, cases.

For the information of the Court and counsel we may say that we know of no case which better illustrates the conflict between the basic principles underlying workmen's compensation laws and the old common law concepts of damages—which appellee is here attempting to re-establish—which have been termed: "the absurd luxury known as personal injury litigation", *Foster v. Congress Square Hotel Co.,* 145 Atl. 400, 67 A.L.R. 239, 128 Maine 50.

The fundamental basis upon which the principles of workmen's compensation are erected, i.e. *rehabilitation of the injured workman,* is paramount. It was recently stated by *Marshall Dawson, Bureau of Labor Standards, U.S. Department of Labor,* in an address to the 36th Annual Convention of the International Association of Industrial Accident Boards and Commissions, in Milwaukee, Wisconsin, on September 26, 1950 (the applicable excerpt from which is presented as Appendix IV).

The record here discloses that every effort was made by appellee to enlarge upon his injuries, admittedly severe, and to exhibit them to the jury. The

emphasis placed thereon could only — in appellee's mind — create a mental condition unfavorable to recovery and rehabilitation.

Under the Arizona workmen's compensation law the Commission has a special fund and reserve set up for contributing additional compensation to educate and rehabilitate workmen injured as this man has been. Sec. 56-955, *A.C.A.,* 1939, provides for the setting up of a special fund for this purpose. Upon the present state of facts the Commission would probably have this man in college to get his degree as an electrical engineer. It has educated one injured man who was a telephone lineman to become a dentist, a miner lost his eye to become a chiropractor, a truck driver became a lawyer, as also did a miner who lost his arm; etc. We thereby curtailed money losses. On the other hand, this case, instead of costing $50,000.00 may cost double that sum—were the man to become totally disabled so as to require constant medical care, or, in the case of his death.

Appellee relies on *Judson v. Fielding.* We do not think the case is apposite. It is not binding upon the Arizona Courts, nor upon this Court, for the reason that it was not decided prior to the adoption of the Arizona law; and, in effect, was repudiated by the legislature of New York. It construes Sec. 29 of the Workmen's Compensation Law of New York, before amendment.

For a history of the New York Act, see *Cauldfield v. Elmhurst Contr. Co.* (1945), 53 N.Y.S. (2d) 25, 268

A.D. 661. In 1937 the Massachusetts court reached a different conclusion from that of the New York court, in *Caira v. Caira,* 6 N.E. (2d) 431. So, also, did the Ohio court in *Rosenberger v. L'Archer* (1936), 16 Ohio St. 265, 31 N.E. (2d) 700, as well as the cases cited therein. Oregon, likewise, in *Gray v. Hammond Lumber Co.,* supra.

Another argument, which we think is very persuasive—that the legislature did not intend to permit suits between employees, who were both subject to the compensation law, for injuries by accident arising out of and in the course of employment—is the fact that the general trend in workmen's compensation cases (including Arizona) is to impose upon the employer the liability for injuries resulting from horseplay, assaults, and other causes, where it is now generally held that it is sufficient that the work brings the claimant within the range of peril by requiring his presence there when disaster strikes (*Horovitz "Current Trends in Workmen's Compensation",* Assaults and Horseplay. 41 *Illinois Law Review* 339-341; Vol. 4 *N.A.C.C.A. Law Journal,* pp. 91-99, at page 98; Vol. 5, *N.A.C.C.A Law Journal,* pp. 56-65, inc.; Vol. 12 *Law Society Journal,* May, 1947, No. 6; and, Vol. 25 *Indiana Law Journal,* pp. 573 and 575.

Finally, the evidence is conclusive that appellee accepted the benefits under the award, did not surrender them, and did not timely appeal the matter to the Supreme Court to have the award vacated. His voluntary offer to stipulate that the Industrial Commission

have a lien, of course, is without prejudice as to the rights of the intervenors-appellants, and was so understood between the parties when the stipulation was entered into.

Appellee's argument that a fellow servant *does not* bear the burdens of the compensation system is unsupported by the facts. The State bears part of the cost of the compensation system by providing the housing, lighting, heating, water, etc. The employer bears a maximum of 65% of an employee's loss, the employee assumes not less than 35% thereof, for permanent total disability and temporary total disability, and a decreasing amount for partial disabilities. His estate gets nothing if he leaves no dependents, and the compensation for dependents may be from 15% to 66⅔%, depending upon the number. Medical fees are regulated (Sec. 56-966, *A.C.A.* 1939). The rights of all persons under the system are co-relative.

THE INDEPENDENT CONTRACTOR THEORY.

Another illustration of the contradictory concepts of the theory of the workmen's compensation law, and appellee's contention, is indicated in his argument with reference to the matter of *independent contractors.* Appellee stresses, as controlling, the common law theory of "master and servant". The words "master" and "servant" do not appear anywhere in Art. XVIII, Sec. 8, of the *Constitution,* or in Art. 9, Chapter 56, *A.C.A.* 1939, as amended.

The workmen's compensation law is not restricted to the common law theory that an employee is a menial or a common laborer (appellee's brief, page 51). On the contrary, as provided in Secs. 56-928 and 56-929, *A.C.A.* 1939, the whole concept is an enlarged one. The mere size of the defendant is immaterial.

We concede that an agent may be an independent contractor. However, the contract in issue left no doubt on that score. The right of control was expressly retained by the Gas Company.

It would appear futile to attempt to analyze and distinguish within the course of a brief all the cases cited by appellee. In *Ariz.-Hercules Cop. Co. v. Crenshaw,* supra, the Court said:

> "* * * to draw a distinction between independent contractors is often difficult, and the rules which courts have undertaken to lay down on the subject are not always of simple application."

RESTATEMENT OF AGENCY.

With reference to the matter of restatement of agency, the Arizona Court has held that it will follow the *"Restatement of Agency"* if it is a matter of first impression. The matter is not one of first impression in Arizona, as is clearly indicated from the cases cited, and by the two volumes contained in the pocket supplement at the back of this authority.

The *McCrary* case (appellee's brief, page 45) shows many points of conflict with the facts here. The Court

Court noted the clear distinction made by the amendment (Text set out in Appendix V).

It is noted that the Arizona limitation is more strict than the Longshoremen's Act, both before and after amendment. The Arizona Act reads: "makes application for an award". The Longshoremen's Act reads: "acceptance of compensation under an award".

APPELLEE'S LACK OF KNOWLEDGE.

Another matter upon which we think some comment is necessary as raised by appellee's brief (page 76) is the alleged lack of knowledge, or ignorance, of appellee of his obligation to elect his remedy, if any. The evidence is clear, and the law is unequivocal (Art. XVIII, Sec. 8, Constitution) that the employee was given the right to exercise his option to settle for the compensation and he did so by failing to reject the provisions of the compensation law prior to the injury. Secs. 56-944, 56-945 and 56-946, *A.C.A.* 1939, prescribe the manner of election as between the employer and the employee, and impliedly between his co-employees (Sec. 56-949, *A.C.A.* 1939). And the latter afforded him an election as to third parties in the same employ.

Under the provisions of the Constitution and the statute he is charged with knowledge thereof, *S. H. Kress & Co. et al. v. Superior Court,* supra; as are also his dependents, *Corral v. Ocean Acc. & Guar. Corp.,* supra; although the law affords them a limited,

and special, remedy for the employee's death. *Kay v. Hillside Mines,* 54 Ariz. 36, 91 P. (2d) 867. *Rules of Commission* Nos. 70 to 76, inc., are designed to protect the rights of claimants.

Counsel argues that intervenors-appellants' position is predicated upon "technical rules". All of appellee's rights, and of all parties, are predicated on the statute. Appellee must bring himself within the provisions of the statute. The Commission has no jurisdiction nor right to extend benefits under any other theory. It must enforce the law impartially as between employer and employee, and third parties who may be affected thereby.

The cases and authorities cited by appellee on this question (pages 74 to 81 of his brief) are not apposite under the Arizona statute, and the facts in the case, upon the grounds: first, that the applicant at all times believed that he had a cause of action against the defendants; and, secondly, the statute upon which he relies provides no election as against a co-employee, as he contends on page 77 of his brief.

FINALITY OF AN AWARD.

In *Lee Moor Contr. Co. et al. v. Industrial Commission,* 65 Ariz. 300, 179 P. (2d) 786, the Arizona Supreme Court held that when an award of accident benefits and compensation is made, and becomes final by payment, and acceptance, without appeal, it is *res judicata* upon all parties. This accords with the pro-

visions of Sec. 56-950 *A.C.A.* 1939, and Rules 28 and 70 to 76, inc. of the *Rules of Procedure* before the *Industrial Commission.* Rule 72 reads:

> "*Acceptance of compensation constitutes election.* Acceptance of compensation from the Commission, or other insurance carrier, shall be deemed to be an election to take compensation."

The *Rules of Procedure* have been adopted under the general authority of the Commission to make such rules, Sec. 56-920, *A.C.A.* 1939; and have the effect of law. *Smith v. Industrial Commission,* 65 Ariz. 43, 173 P. (2d) 753; *Guy F. Atkinson v. Kinsey,* 61 Ariz. 127, 144 P. (2d) 547; *Nevitt v. Industrial Commission,* 70 Ariz. 172, 217 P. (2d) 1039.

INVITED ERROR.

Appellee urges, brief, page 72, that counsel invited error and is estopped to assert a different theory. Counsel did not invite error, and has adopted no different theory. The statement concerning our status has recently been affirmed by the Supreme Court of Arizona in *Orosco v. Industrial Commission,* unreported.

The argument appellee quotes, as we have previously stated, *in which the remarks were made,* related to rescission of election after receipt of compensation by a person *competent* to make an election, and not with the question of the right to sue a co-employee. Therefore, the argument and cases cited by appellee have no application here.

CONCLUSION.

The Gas Company asserts that an independent contractor is not involved here. The Industrial Commission insures not only the workmen's compensation liability of the Gas Company, but its employer's liability as well, including the cost of an action. In defending this case, as well as others of like nature, it acts in a Fiduciary capacity. *Sears Roebuck & Co. v. Harris,* 69 Ariz. 320, 213 P. (2d) 672.

An award unreversed by the Supreme Court is conclusive on all parties. *Lee Moor Contr. Co. v. Industrial Commission,* supra. The award in this case is unreversed. The Court has no jurisdiction to ignore the same.

The judgment of the trial Court should be reversed.

Dated, Phoenix, Arizona,
October 30, 1950.

Respectfully submitted,
H. S. McCluskey,
Attorney for Intervenors-Appellants.

Robert E. Yount,
Of Counsel.

(Appendices I to V Follow.)

Appendices.

Appendix I

Article XVIII, Section 8—Constitution of Arizona

"(Workmen's Compensation.)—The legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the state, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the legislature may prescribe by which compensation shall be required to be paid to any such workman in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of, and in the course of, such employment, is caused in whole or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees, to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to retain the right to sue said employer as provided by this constitution; and, provided further, *in order to assure and make certain a just and humane compensation law in the state of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive*

and litigious remedies for injuries to or death of such workmen, now existing in the state of Arizona, and producing uncertain and unequal compensation therefor, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury." (Emphasis supplied.)

Appendix II

Section 99, Chapter 83, Session Laws of Arizona (1925)

"WHEREAS, to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of workmen, their widows, children, and other dependents, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, *producing uncertain and unequal compensation therefor and engendering hatred and distrust between employee and employer,* an early operation of this Act is required to preserve the peace, health and safety, an emergency is hereby declared to exist and this Act is, therefore, hereby exempted from the operation of the referendum provisions of the State Constitution." (Emphasis supplied.)

Appendix III

"Status of Kress Case As It Relates to Defendant Wise.

"Wise was the Assistant Manager of the Kress store in Phoenix. He, upon the written representation of plaintiff that he was 16 years of age, employed the plaintiff during the school vacation and put him to work as a stock boy. Other than that, there are no allegations or showing that he had anything to do with the injury sustained by the plaintiff.

"Plaintiff, and defendant Wise, both were employees of the defendant Kress.

"All of the allegations with reference to employment, insurance, and compliance with the Compensation Law, and the defenses as to Kress, apply with like effect to the defendant Wise. Wise was the agent of Kress in employing the plaintiff.

"If plaintiff is subject to the workmen's compensation law and it is his exclusive remedy, either on the point of being bound by its provisions by reason of his failure to elect to reject the act prior to injury, or in the alternative, by his application for, receipt, and acceptance of, compensation benefits under the order *Sections 56-950* and *56-967,* then plaintiff has no cause of action against Wise by reason of the following:

> '*Sec. 56-949. Liability of third person to injured employee.* If an employee entitled to compensation hereunder is injured or killed by the negligence or wrong of another *not in the same employ,* such injured employee, or in the case of

death, his dependents, shall elect whether to take compensation under this title or to pursue remedy against such other. If he elect to take compensation, the cause of action against such other shall be assigned to the state for the benefit of the compensation fund, or to the person liable for the payment thereof, and if he elect to proceed against such other, the compensation fund or person, shall contribute only the deficiency between the amount actually collected and the compensation provided or estimated herein for such case. Compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for herein shall be made only with the written approval of the commission, or of the person liable to pay the same.' (Emphasis ours)

the point being that both claimant and Wise were in the same employ, and the defendant Wise may not be sued as a third party defendant."

Appendix IV

Excerpt from address to 36th Annual Convention of International Association of Industrial Accident Boards and Commissions, Milwaukee, Wisconsin, September 26, 1950,

by

Marshall Dawson, Bureau of Labor Standards, U. S. Department of Labor

"In workmen's compensation, rehabilitation as a goal must be kept in sight from the day of a worker's injury. But in a damage suit, rehabilitation is kept out of sight and so far as possible out of mind until after a verdict has been won. Up to that point, in a damage suit it is necessary for the lawyer and the doctor to keep the injured person appearing as hopeless and forlorn as possible. This is even true of jury appeals in workmen's compensation, found in a few States, as explained to me by the distinguished lawyer and former Ohio commissioner, Tom Duffy. The pathetic plight of the injured person and his family is exhibit No. 1 in the jury trial. The strategy is to imply that the insurance carrier is rich and that the injured person needs money. 'That done,' said Mr. Duffy, 'getting a verdict is like taking candy from children.' In such circumstances, a compensation commission is not only at the mercy of the legislature and the courts, but also of the lawyers.

"The distinction between liability and compensation attitudes cannot be over-emphasized, as to the effect upon a rehabilitation program. The director of a rehabilitation center told me of a young

amputee who enrolled in the center, had been fitted with artificial members, and was making excellent progress in an accounting course. He had been assured a good job upon the completion of his training. But one day he took off his artificial members and dropped the training course. He explained to the director that when he enrolled he had expected to accept a voluntary settlement of $40,000 from his employer, but now a lawyer had told him that if he sued he could get more money. And his lawyer wanted to exhibit to the jury a helpless, not a rehabilitated person."

Appendix V

Quotation of foot-note, page 852, Volume 67 Supreme Court report of *American Stevedores v. Porello;* also reported in 330 U.S. 446, and 91 L. Ed. 1011.

"The statute formerly provided, 44 Stat. 1440: 'Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election'.

"Under this form of the statute courts had held that acceptance of compensation precluded the employee from suing a third party tort feasor. *Sciortino v. Dimon S. S. Corp.,* D. C., 39 F. (2d) 210, affirmed 2 Cir., 44 F. (2d) 1019; *Toomey v. Waterman S. S. Corp.* 2 Cir., 123 F. (2d) 718, *The Nako Maru,* 3 Cir., 101 F. (2d) 716, *Freader v. Cities Service Trans. Co.,* D. C., 14 F. Supp. 456. Contra, *Johnsen v. American-Hawaiian S. S. Co.,* 9 Cir., 98 F. (2d) 847.

"As amended the statute provides, 52 Stat. 1168: 'Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.

"33 U.S.C. Sec. 933 (a), 33 U.S.C.A. Sec. 933 (a): 'If on account of a disability or death for which compensation is payable under this chapter

the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person'."